Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

JOINT COMMENTS OF THE PROMOTING ACTIVE COMPETITION EVERYWHERE ("PACE") COALITION AND THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ("COMPTEL")

The Promoting Active Competition Everywhere ("PACE") Coalition and the Competitive Telecommunications Association ("CompTel"), through their attorneys, submit these comments in response to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] The Commission seeks comment on whether it should reconsider its current rules implementing section 252(i) of the Communications Act of 1934, as amended (the "Act") (*i.e.*, "pick and choose" rule), under which requesting carriers are permitted to opt into portions of interconnection agreements without accepting all the terms and conditions of such agreements.

The PACE Coalition is composed of competitive local exchange carriers ("CLECs") that provide a variety of telecommunications services to business and residential

[1] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, ¶¶ 713-29 (rel. Aug. 21, 2003) (*TRO Further Notice*).

consumers throughout the country.[2] Each of the PACE Coalition carriers offers a form of bundled local exchange and long distance services, among other services. In providing their services to residential and small business customers, PACE Coalition carriers use the combination of unbundled network elements ("UNEs") commonly referred to as UNE-P.

CompTel is the premier industry association representing competitive telecommunications providers and their suppliers in the United States. CompTel's member companies include the nation's leading providers of competitive local exchange services and span the full range of entry strategies and options. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for all of its members, both today and in the future.

The Commission's current pick and choose rule tracks the explicit language of section 252(i) of the Act and cannot – and should not – be altered.[3] The Commission's proposed approach (modified from a Mpower Communications proposal) does not comport with the plain language of the Act, and, therefore, is unlawful.[4] Moreover, modifying the pick and choose rule as proposed would not promote meaningful negotiations of interconnection agreements. To the contrary, in effect, the Commission would eliminate any scintilla of bargaining power that the

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2 PACE Coalition members include: ACCESS Integrated Networks, Inc.; ATX Communications, Inc.; Birch Telecom; BizOnline.com, Inc. d/b/a Veranet Solutions; BridgeCom International; DataNet Systems; DSCI Corp.; Ernest Communications; IDS Telcom LLC; InfoHighway Communications; ITC^DeltaCom Communications, Inc.; Granite Telecommunications; MCG Capital Corporation; MetTel; Microtech-Tel; Momentum Business Solutions Inc.; nii communications; Sage Telecom, Inc.; and Z-Tel Communications, Inc. PACE Coalition member Sage Telecom, Inc. is not participating in this filing.

3 47 C.F.R. § 51.809(a) (stating in pertinent part, "[a]n incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any interconnection agreement to which it is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.").

4 Mpower Petition for Forbearance and Rulemaking, CC Docket No. 01-117 (filed May 25, 2001).

CLECs might have in negotiating interconnection agreements with incumbent local exchange carriers ("ILECs").[5]

It is essential that the Commission retain the current pick and choose rule so as to provide CLECs with some leverage in their attempts to negotiate appropriate interconnection agreements and, where negotiation is not practical or efficient, to select among provisions within approved interconnection agreements to create an agreement. The Commission already has built safeguards into its pick and choose rules for ILECs, and retaining the current rules would not harm any party. Accordingly, the Commission should maintain the status quo and confirm that CLECs are permitted to pick and choose among the terms and conditions of approved interconnection agreements.

I. THE FCC DOES NOT HAVE THE AUTHORITY TO MODIFY A STATUTE

Pursuant to section 252(i), ILECs are required to make available "any interconnection, service, or network element" to any other requesting telecommunications carrier "upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). The language of the statute is clear: CLECs must be able to select among the terms and conditions of various interconnection agreements. Indeed, in *AT&T v. Iowa Utilities Board*, the Supreme Court affirmed the Commission's interpretation of section 252(i), and stated that the "interpretation is not only reasonable, it is the most readily apparent."[6]

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5 The absurdity of the Commission's proposal is evident by the fact that even Mpower – the carrier that initially proposed a modified interpretation of the pick and choose rules – no longer endorses its own proposal, upon which the Commission based its modified approach. *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Douglas G. Bonner, LeBoeuf, Lamb, Greene & MacRae, Counsel to Mpower (Oct. 14, 2003) (withdrawing its May 25, 2001, Petition, and stating that the "current telecommunications industry circumstances do not provide adequate incentives for the May, 2001 Flex Contract proposal"). The sole remaining supporters are the ILECs, which seven years after the implementation of the 1996 Act, have retained their stronghold on the local telecommunications market and accordingly, control the course of negotiations for interconnection agreements.

6 *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 369 (1999).

The Commission's proposal does not satisfy the explicit requirement in section 252(i) that CLECs have access to all interconnection, services, and network elements contained within interconnection agreements. Under the Commission's proposal, in states where ILECs have a statement of generally available terms and conditions ("SGAT"), CLECs would not be permitted to pick and choose among various terms of interconnection agreements.[7] Instead, CLECs would be required to take the SGAT, opt into an existing interconnection agreement in its entirety, or negotiate (or arbitrate) their own agreement. Section 252(i) does not restrict a requesting carrier's right to obtain interconnection, network elements, or services, nor does it condition a carrier's ability, for example, to obtain a particular service on its acceptance of other services, interconnection or network elements.[8] As proposed, CLECs would not have access to all of the interconnection, services, and network elements set forth in the interconnection agreements as mandated by the Act.

Contrary to the Commission's tentative conclusion,[9] this is not a situation where the Commission is attempting to substitute one interpretation of the provisions of the Act for another equally valid interpretation. The express language of the statute requires that CLECs be permitted to select among various interconnection, services, and network elements. The Commission's proposed modification to the current pick and choose rule would limit items to which a CLEC is entitled to receive under the statute in violation of the Congressional mandate. Accordingly, the Commission's proposal is not an interpretation, but an attempt to rewrite the

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7 *See TRO Further Notice* ¶ 725.

8 There is one exception to this general rule: ILECs may seek to require a requesting carrier to accept all terms that it can prove are "legitimately related" to the desired term. *See infra* at 5.

9 *See TRO Further Notice* ¶ 716.

express language of the Act, which the Commission does not have the authority to do,[10] and must be rejected.

II. THE MODIFIED APPROACH WOULD NOT RESULT IN MORE MEANINGFUL NEGOTIATIONS

A. Pick and Choose is the Only Leverage that CLECs Possess

There is no question that incumbents have far more leverage in the negotiation process than CLECs. Seven years after the implementation of the 1996 Act the BOCs retain substantial control over the local telecommunications markets.[11] Now that the Commission has granted interLATA operating authority to the BOCs in all but a small handful of states, the BOCs do not have any incentive to open their markets to competition. The underlying record in this proceeding already demonstrates that the pick and choose rule is fundamental to providing CLECs with any semblance of a level playing field in negotiating to obtain interconnection and essential network components.[12] This leverage is necessary whether the CLEC ultimately determines to opt into an existing agreement or to negotiate its own agreement. Contrary to the Commission's tentative conclusion, its proposal will not result in more meaningful negotiations.[13] To the contrary, CLECs will be stripped of any leverage in the negotiation process, and ILECs will have greater opportunities and incentives to engage in bad faith negotiations and to insert "poison pills" into agreements.

The current pick and choose rule does not discourage genuine commercial negotiations or in any way harm the ILECs. The Commission already has provided safeguards to

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10 *See, e.g., Indiana Michigan Power Company v. Department of Energy,* 88 F.3d 1272, 1276 (D.C. Cir. 1996) (rejecting agency ruling as a "rewrite" of the statute rather than an interpretation).

11 Trends in Telephone Service, Industry Analysis and Technology Division, Wireline Competition Bureau, at Table 8-1 (Aug. 2003) (stating that ILECs hold approximately 87 percent of the end-user switched access lines).

12 *See, e.g.,* Z-Tel Comments at 1-9; AT&T Comments at 7.

13 *See TRO Further Notice* ¶ 722.

ILECs in the context of pick and choose. Specifically, an ILEC may petition the state commission to require a requesting carrier to accept all terms that it can prove are "legitimately related" to the desired term.[14] ILECs also may curtail a CLECs ability to select a particular provision due to technical infeasibility and cost issues.[15] Indeed, the Supreme Court has concluded that "in some respects, the rule is more generous to incumbent LECs than § 252(i) itself."[16] Furthermore, ILECs have not demonstrated that CLECs have exploited the Commission's pick and choose rule or otherwise have engaged in bad faith negotiations as a result of the pick and choose rule. There is simply no merit to eliminating the Commission's current pick and choose rules due to alleged burdens it imposes on ILECs.

There is no "one size fits all" interconnection agreement. In the *Local Competition Order*, the Commission specifically stated that "few new entrants would be willing to elect an entire agreement that would not reflect their costs and the specific technical characteristics of their networks or would not be consistent with their business plans."[17] As one example, UNE-P carriers require fundamentally different terms and conditions in their interconnection agreements than UNE-L carriers. It would not be technically or economically feasible in the vast majority of instances for these two types of carriers to opt-into the same exact agreement. Under the Commission's modified approach, however, ILECs will be able to take

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14 *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16139, ¶ 1315 (1996) (*Local Competition Order*). In doing so, the Commission contemplated that there might be a legitimate quid pro quo involved in the negotiation process.

15 *See* 47 C.F.R. § 51.809(b)(stating that the obligation to make available interconnection, services, or network elements does not apply if the ILEC provides to the state commission that "(1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.").

16 *AT&T v. Iowa Utilities Board*, 525 U.S. at 396.

17 *Local Competition Order*, 11 FCC Rcd at 16138, ¶ 1312.

advantage of these distinctions by inserting "poison pills" into agreements. In implementing the pick and choose rule, the Commission correctly acknowledged that "failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into the agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement."[18] Even if not designed as a poison pill, ILECs will be able to exploit the distinctions among CLECs by including provisions in an interconnection agreement that essentially negate the ability of any other CLEC to opt into that same agreement.

There has been no change since the Commission's statements in the *Local Competition Order* that justifies elimination of the current pick and choose rule. CLECs continue to have different technical needs, constraints and costs, and, in many instances, it simply is not workable to opt into an agreement in its entirety. Moreover, the threat of poison pills remains, as ILECs continue to prove that they will not hesitate to take actions to impede CLEC growth. The Commission was correct in the *Local Competition Order* when it stated that "requiring requesting carriers to elect an entire agreement would appear to eviscerate the obligation Congress imposed in Section 252(i),"[19] and it should not now take any action to eliminate the provisions of section 252(i).

B. CLECs Will Not Have Access to Interconnection, Network Elements, and Services under the Commission's Proposal

1. *SGATs Should Not Be Considered*

The Commission should not use an SGAT as a basis for determining whether the pick and choose rule should apply. As an initial matter, under the plain language of the Act, ILECs must make any interconnection, network elements, and services available to requesting

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18 *Id.*

19 *Id.*

carriers on the same terms and conditions.[20] The Act does not make any exception if there is an SGAT or other agreement already in place. The Commission, therefore, cannot condition the application of the Act on whether an ILEC has an approved SGAT on file in a particular state.

Furthermore, putting aside the unambiguous language of the Act, the Commission should not use an SGAT as a baseline for determining whether its pick and choose rule should apply. In its *Further Notice*, the Commission seems to suggest that ILECs file and obtain approval for the SGAT from each state commission.[21] The Commission has not established uniform guidelines for states to use in reviewing and approving SGATs. It has been the experience of the members of the PACE Coalition and CompTel that procedures for reviewing and approving SGATs vary widely among states. In many states, the state commission treats an SGAT like a tariff; in other words, the state does not review the SGAT, but allows it to go into effect automatically.[22] As a result, in the majority of the states the ILEC is the sole author of the SGAT, and there is no CLEC or state commission input whatsoever. Moreover, there is no "one size fits all" SGAT. For these reasons, the Commission should not put any weight in the fact that an ILEC might have an SGAT on file and "approved" by a state commission.

2. *CLECs Will Be Forced To Negotiate or Arbitrate Each and Every Interconnection Agreement in Violation of the Act*

As a practical matter, under the Commission's proposal, CLECs will be forced to negotiate or arbitrate each and every interconnection agreement, and, therefore, section 252(i) of the Act will be eviscerated. CLECs already have encountered substantial obstacles in exercising

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20 47 U.S.C. § 252(i).

21 *See TRO Further Notice* ¶ 725 (stating that if "incumbent LECs do file and obtain state approval for an SGAT, however, the current pick-and-choose rule would apply solely to the SGAT, and all other approved interconnection agreements would be subject to an 'all-or-nothing' rule requiring carriers to adopt the interconnection agreement in its entirety.").

22 *See* 47 U.S.C. § 252(f) (stating that the "State commission to which a statement is submitted shall, not later than 60 days after the date of such submission – (A) complete the review of such statement ...; or (B) permit such statement to take effect.").

their opt-in rights pursuant to section 252(i) of the Act, whether opting into the interconnection agreement as a whole or opting into provisions of various agreements. ILECs routinely attempt to impede a CLEC's ability to exercise its rights to opt into an agreement under section 252(i), and the Commission's proposal will exacerbate this problem. As a result, CLECs will be forced to engage in arduous negotiations and arbitrations to obtain interconnection agreements, and no longer will have access to other carriers' agreements as required by section 252(i) of the Act.

ILECs have refused to make certain agreements available for adoption – either in part or in their entirety – by requesting carriers. As one example, state commissions already have found ILECs guilty of entering into "secret" agreements.[23] In addition, it has been the experience of certain PACE Coalition and CompTel members that BellSouth will enter into side agreements with some CLECs. BellSouth claims that these agreements are not subject to sections 251 and 252 of the Act, and, therefore, that it is not required to file these agreements with the appropriate state commission, such that they are available to other requesting carriers. BellSouth also refuses to classify any agreements entered into pursuant to the "Bona Fide Request/New Business Request" process as subject to the filing requirement. Accordingly, BellSouth already limits the availability of existing interconnection agreements for adoption. With the elimination of the pick and choose rule, ILECs will have even more incentive to limit the number of available agreements so as to force CLECs to expend their limited resources negotiating or arbitrating new agreements.

Without the ability to pick and choose among provisions of interconnection agreements, ultimately, CLECs will be forced to negotiate or arbitrate each and every interconnection agreement. As a practical matter, CLECs do not have the necessary resources –

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[23] *See, e.g., Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197, Order Assessing Penalties (Feb. 28, 2003) (finding that Qwest had repeatedly discriminating against CLECs by making provisions in certain agreements available to some CLECs but not others).

financial, employee, and otherwise – to negotiate or arbitrate all of their interconnection agreements. In the *Local Competition Order,* the Commission acknowledged that "[u]nbundled access to agreement provisions will enable smaller carriers who lack bargaining power to obtain favorable terms and conditions – including rates – negotiated by large IXCs, and speed the emergency of robust competition."[24] Robust competition still does not exist today. CLECs, in particular smaller CLECs, still lack the power to negotiate agreements containing favorable terms. Moreover, it is extremely costly and time consuming for carriers to negotiate interconnection agreements. Having to negotiate or arbitrate an agreement in each state in which the CLEC operates will take desperately needed resources away from other business operations. In those situations in which CLECs determine it is appropriate to negotiate an agreement, as stated above, the pick and choose rule is necessary for leverage.

III. CONCLUSION

For the foregoing reasons, the PACE Coalition and CompTel request that the Commission retain its current pick and choose rules and decline to implement the proposal contained in the *TRO Further Notice.*

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October 16, 2003

[24] *Local Competition Order,* 11 FCC Rcd at 16138-39, ¶ 1313.